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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 355

BEN SUGARMAN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, In the Matter of the Application of BEN SUGARMAN for a Writ of Habeas Corpus,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND OPPOSITION TO MOTION FOR PERMISSION TO DISPENSE WITH THE PRINTING OF THE TYPEWRITTEN RECORD

STATEMENT OF THE CASE

Petitioner requests a writ of certiorari to the Supreme Court of the State of California to review the order of said court denying without opinion the petition of BEN SUGARMAN for a writ of habeas corpus.

Subsequent to a final decision in the case of *People* v. *Burton, Martin, and Sugarman,* 91 Advance California Appellate Reports 817, 205 P. (2) 1065, on June 9, 1949, this petitioner filed an application for writ of habeas corpus in the Superior Court of the State of California, in and for the County of San Joaquin. This petition, raising no matters not heretofore presented to the appellate courts on the appeal from the original judgment, was denied without opinion on said date. On June 10, 1949, the petitioner filed a petition for writ of habeas corpus with the District Court of Appeal of the State of California, in and for the Third Appellate District. This petition was denied without opinion by said court on June 15, 1949. Thereafter, on July 1, 1949, petitioner filed a petition for writ of habeas corpus with the Supreme Court of the State of California, which said petition was denied without opinion by said court on July 14, 1949. No petition for rehearing, however, was filed with said Supreme Court of the State of California. Thereafter petitioner filed this petition for writ of certiorari within the 90-day period as provided by Rule 38½ of the Rules of the Supreme Court of the United States.

In view of the inaccuracies contained in petitioner's statement of facts in the petition for writ of certiorari from the judgment of the District Court of Appeal of the State of California (which petitioner has incorporated by reference in this petition), respondent in its brief in opposition thereto has set forth

an additional statement pursuant to Section 4 of Rule 27 of this court. This statement of facts contained in respondent's brief is hereby readopted by reference as though fully set forth herein.

As appears from both of the petitions for writ of certiorari, the points raised by petitioner herein are the same. He challenges the constitutionality of Sections 954 and 1098 of the Penal Code of the State of California as construed and applied to the petitioner Sugarman, alleges that the trial was unfair and that he was "singled out for invidious treatment by the State of California in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States."

The Attorney General of the State of California signed a stipulation at the time the petition for writ of habeas corpus was presented to the Supreme Court of the State of California, to the effect "that a hearing may be granted in the above-entitled matter to settle the important constitutional questions involved under state and federal procedure for separate trials in this State on the constitutionality of the statutes involved."

However, the action of the Supreme Court of the State of California in denying said petition for writ of habeas corpus merely affirmed the respondent's contentions maintained throughout the original action on the merits that the provisions of the applicable statutes, Sections 954 and 1098, were constitutional in their application to petitioner; that the matter was a

question of state procedure and that in no manner had the petitioner herein affirmatively shown that he was "singled out for invidious treatment by the State of California in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States."

ARGUMENT

SUMMARY OF ARGUMENT

I. The Petition for Writ of Habeas Corpus Does Not Lie in the Instant Matter.

II. Sections 954 and 1098 of the Penal Code of the State of California as Construed and Applied in the Instant Matter Are Constitutional.

III. The Instant Proceedings Did Not Violate the Due Process or Equal Protection Provisions of the Federal Constitution as Contained in the Fourteenth Amendment.

I. The Petition for Writ of Habeas Corpus Does Not Lie in the Instant Matter

Although habeas corpus has been considered a proper vehicle for invoking the decision of the state appellate courts upon the constitutionality of an ordinance and the validity of a petitioner's restraint thereunder, *it is not the equivalent of an appeal* and may not be used as a device for the correction of mere errors or irregularities committed within the exercise of the court's admitted jurisdiction.

In re Porterfield, 28 Cal. (2) 91, 168 P. (2) 706;
Ex parte Drew, 188 Cal. 717, 720, 207 P. 249;
In re Bell, 19 Cal. (2) 488, 122 P. (2) 22;
Bowen v. *Johnston,* 306 U. S. 19, 26-27, 59 S. Ct. 442, 83 L. Ed. 455.

In this matter, the question of the constitutionality of Sections 954 and 1098 of the Penal Code of the

State of California and their application to the petitioner herein was discussed by the District Court of Appeal in its decision on the appeal in said action (*People* v. *Burton, et al.,* 91 A. C. A. 817, 205 P.(2) 1065), and the constitutionality of said sections upheld. The question was again raised in the petitions for rehearing and hearing before the Supreme Court of the State of California, both of which petitions were denied. Thus it appears that the matter was fully considered by the appellate courts of the State and this situation may not be considered in the same category as a conviction based upon an ordinance where the court of last resort would be the Superior Court of the State and habeas corpus properly issued from the appellate courts to review the constitutionality of such ordinance.

Petitioner herein has raised no points which have not hitherto been considered by the courts of the State of California and respondent would respectfully direct the court's attention to the respondent's briefs filed in the District Court of Appeal of the State of California, in and for the Third Appellate District, in the action entitled *People* v. *Burton, et al.,* 91 A. C. A. 817, 205 P. (2) 1065 (the appeal on the merits), respondent's answer to the petition for rehearing, and its answer to the petition for hearing in the California Supreme Court.

It is apparent that the issues were not so confounded and confused that an innocent person was lost in his defense. Nor may it be urged that peti-

tioner herein was the victim of "mass trials." He was indicted with two codefendants. Each was found guilty of the crimes charged. The appellate courts of the State of California reviewed in detail the evidence presented and the instructions given to the jury. Any error complained of in such trial proceeding was within the scope of the state court's review on appeal and an attack by way of habeas corpus may not be made.

In re Porterfield, 28 Cal. (2) 91, 168 P. (2) 706;
In re Lindley, 29 Cal. (2) 709, 177 P. (2) 918;
Bowen v. *Johnston,* 306 U. S. 19, 26-27, 59 S. Ct. 442, 83 L. Ed. 455.

II. Sections 954 and 1098 of the Penal Code of the State of California as Construed and Applied in the Instant Matter Are Constitutional

The original transcript in this matter contained some 6,000 pages of testimony. True, there were conflicts in the evidence; however, such conflicts were resolved against the defendants and the petitioner herein by the jury and affirmed on appeal.

People v. *Newland,* 15 Cal. (2) 678, 104 P. (2) 778;
People v. *Perkins,* 8 Cal. (2) 502, 66 P. (2) 631.

Contrary to petitioner's contention, at least 75 percent of the evidence adduced at the joint trial would have been admissible against petitioner Sugarman on a separate trial. An examination of the entire record in this matter disclosed that approximately 90 of the 108 witnesses called by both the prosecution and the

defense, gave testimony which would have been admissible in a separate trial of petitioner Sugarman. All of such testimony related to the extent of the damage, if any, caused by the fire, which was the substantial element of importance common to all the charges of the indictment.

An examination of the entire record in the court below demonstrates that the determination of the triers of fact was not so lacking in evidentiary support that to give it effect would work that fundamental unfairness which is at war with due process.

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166.

It should be remembered that the joinder of the offenses and the defendants in the original proceeding in this case was pursuant to the specific provisions of the California statutes permitting such action.

Section 954 of the California Penal Code (set forth in appendix) permits the joinder in an indictment of two or more different offenses which are connected together in their commission or two or more different offenses of the same class of crimes.

To render the joining of counts in an indictment valid, the Supreme Court of the State of California in the case of *In re Pearson,* 30 Cal. (2) 871, 186 P. (2) 401, has held it to be sufficient if the offenses are of the same class or "if there is a common element of substantial importance in their commission." The District Court of Appeal of the State of California in its decision on this case on the merits (*People* v.

Burton, et al., 91 A. C. A. 817, 205 P. (2) 1065) stated:

> "It clearly appears that in each of the main circumstances the occurrence of the fire, the subsequent attempts to defraud the insurers, and the filing of false claims and appraisals is a common element of substantial importance in the offenses included in the indictment so as to permit their joinder."

To the same effect, see:

People v. *Bundte,* 87 C. A. (2) 735, 197 P. (2) 823, (cert. den. 337 U. S. 915);
People v. *Moore,* 87 C. A. (2) 753, 197 P. (2) 835, (cert. den. 337 U. S. 915);
People v. *Duane,* 21 C. (2) 71, 130 P. (2) 123;
People v. *Jordan,* 24 C. A. (2) 39, 74 P. (2) 519;
People v. *Flores,* 62 C. A. (2) 700, 145 P. (2) 318;
People v. *Guerrero,* 22 C. (2) 183, 137 P. (2) 21;
People v. *Grossman,* 28 C. A. (2) 193, 82 P. (2) 76;
People v. *Scott,* 24 C. (2) 774, 778, 151 P. (2) 517.

In the case of *People* v. *Grossman,* 28 C. A. (2) 193, 82 P. (2) 76, the point here presented—the question of joinder of offenses—was raised. Appellant in the *Grossman* case was convicted on an indictment charging six counts: (1) conspiracy to commit grand theft; (2) attempt to commit grand theft; (3) a violation of Section 556(a) of the Insurance Code of the State of California; (4) a violation of Section 556(b) of the Insurance Code of the State of California; (5) a violation of Section 556(b) of the

Insurance Code of the State of California, and (6) conspiracy to violate Section 556 of the Insurance Code. The counts were pleaded in one indictment and defendant contended Section 954 of the Penal Code of the State of California permitting such joinder was unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. The court in refuting such statement used the following language:

> "*People* v. *Kelly,* 203 Cal. 128 (263 Pac. 226) and *In re Culver,* 84 Cal. App. 295 (257 Pac. 876), each hold that section 954 is not invalid. The latter case holds it is not vulnerable to the attack the defendant makes."

Section 1098 of the Penal Code of the State of California (set forth in appendix), deals with the trial of defendants who have been charged jointly, the requirement being that they be tried jointly unless the court shall order separate trials. This section is declaratory of the common law.

People v. *Perry,* 195 Cal. 623, 234 P. 890.

In the case of *People* v. *Yeager,* 194 Cal. 452, 229 P. 40, the validity of this section was upheld and the court stated:

> "It is within the province of the legislature to vest the trial court with authority to decide whether there shall be a separate or a joint trial of defendants jointly charged."

Again, in the cases of *People* v. *Dowell,* 204 Cal. 109, 266 P. 807 (cert. dismissed, 278 U. S. 660), and

People v. *England,* 140 Cal. App. 310, 315, 35 P. (2) 565, wherein the validity of the statute was in issue, the courts of the State of California found that there was no federal question, constitutional or otherwise, involved.

23 *Corpus Juris, Secundum,* Sec. 933, p. 219;
16 *Corpus Juris, Secundum,* Sec. 581, p. 1186.

The law of the State of California, as does the federal law, vests the trial court with discretion in granting a separate trial and this discretion will not be interfered with by an appellate court in the absence of a showing of abuse of such discretion.

People v. *Baa,* 24 Cal (2) 374, 150 P. (2) 1;
People v. *King,* 30 Cal. App. (2) 185, 85 P. (2) 928;
People v. *Isby,* 30 Cal. (2) 879, 897, 186 P. (2) 405;
4 *Cal. Jur., 10 Yr. Supp.* (1943 Rev.), Sec. 268, p. 718; Note: 104 A. L. R. 1519.

The appellate courts of the State of California found that the trial court acted within its discretion in so denying petitioner a separate trial, and petitioner has cited no competent authority, federal or state, showing that such discretion was abused or that Sections 954 or 1098 of the Penal Code of the State of California are, or should be, held unconstitutional in their application to petitioner.

III. The Instant Proceedings Did Not Violate the Due Process or Equal Protection Provisions of the Federal Constitution as Contained in the Fourteenth Amendment

To afford due process of law an indictment or information must contain a statement of the facts which constitute the offense with reasonable certainty so as to advise the accused what he has to meet and give him a fair and reasonable opportunity to prepare his defense. Due process is not denied by the charging of two or more different offenses of the same class of crimes in one indictment or information nor the joinder of defendants.

16 *Corpus Juris, Secundum,* Sec. 587, p. 1180;
42 *Corpus Juris, Secundum,* Sec. 180, p. 1140.

Due process of law is process due according to the law of the land. This process in the State is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein.

Holden v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383;
Hurtado v. *State of California,* 110 U. S. 516, 4 S. Ct. 111.

In this matter in accordance with the established law of the State of California, the three defendants were charged with the offenses listed in the indictment. Petitioner has not demonstrated that the action of the trial court in denying his motion for a severance constituted an abuse of discretion by such trial court. The appellate courts of California found that

the trial court acted within the bounds of its discretion in denying such motion as the great majority of the evidence adduced at the joint trial would have been admissible against petitioner in a separate trial. Thus petitioner has not established how or in what manner his rights were prejudiced by the application of the provisions of Sections 954 and 1098 of the Penal Code of the State of California to his case.

The cases cited by petitioner in support of his specifications of error do not constitute authority therefor. *Ashe* v. *United States,* 2 F. (2) 735, was reversed by this court in the case of *Ashe* v. *Valotta,* 270 U. S. 424. *Kotteakos* v. *United States,* 328 U. S. 750, 90 L. Ed. 1557, involved a prosecution in a federal court for a conspiracy to violate the National Housing Act. The court held that the evidence showed more than one conspiracy, that the jury could not possibly have found only one conspiracy, and therefore the trial court erred in instructing the jury that only one conspiracy was shown and that the acts and declarations of one conspirator bound all. *Carter* v. *Illinois,* 329 U. S. 173, involved the denial of right to counsel. *In re Oliver,* 333 U. S. 257, held that an accused who was tried and convicted for contempt of court under order of a one judge-grand jury in grand jury secrecy was not afforded a reasonable opportunity to defend himself and therefore, was denied procedural due process. *Francis* v. *Resweber,* 329 U. S. 459, involved a claim of double jeopardy and cruel and unusual punishment in that the execution of a convicted de-

fendant failed because of mechanical difficulties and the state's rights to again attempt his execution was upheld. In this case the court used language directly applicable to this matter:

> "So long as the law applies to all alike, the requirements of equal protection are met."

The case of *Krulewitch* v. *United States,* 93 L. Ed. 623, merely holds that extra-judicial declarations of a co-conspirator were not admissible when made after the conspiracy was over. *Mooney* v. *Holohan,* 294 U. S. 103, involved the use of perjured testimony knowingly by the prosecution. No such claim was or could be made in the instant matter.

In *De Jonge* v. *Oregon,* 299 U. S. 353, 57 S. Ct. 255, a conviction for violation of Oregon's Criminal Syndicalism Law was reversed. There it was held that a conviction under such statute for participation in a public meeting, otherwise lawful, merely because it was held under the auspices of an organization which advocated use of violence to effect political change although no such teaching was made at the meeting, violated the right of free speech and assemblage. None of the remainder of the cases cited by petitioner is factually similar to the case at bar nor presents similar problems. Respondent would note, however, that the language of this court in the case of *Carter* v. *Illinois,* 329 U. S. 173, is directly applicable to the instant matter.

> "But the due process clause has never been perverted so as to force upon the 48 States a uni-

> form code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual states. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. *Brown* v. *New Jersey,* 175 U. S. 172, 175; *Missouri* v. *Lewis,* 101 U. S. 22, 31."

In the case of *People* v. *Davis,* 42 Cal. App. (2) 70, 108 P. (2) 85, the question presented was whether the court could consolidate for trial indictments charging different defendants who also were charged with different, *unconnected* offenses, and the court held that was improper. This, however, was not the factual situation in the instant case where the offenses all arose out of one transaction, and were included within one indictment. Likewise, in the case of *People* v. *Brower,* 92 A. C. A. 668, 207 P. (2) 571, the petitioner has quoted from and relied on the dissenting opinion in said case and not the majority opinion which upheld the judgment of the trial court.

CONCLUSION

Upon the record and for the reasons stated respondent sincerely believes that the decision of the California Supreme Court denying the petition for writ of habeas corpus was correct. That the points

sought to be raised on the petition for writ of habeas corpus were within the scope of review on appeal by the state courts; that the judgment of the state court on the merits upholding the application of Sections 954 and 1098 of the Penal Code of the State of California to the instant matter were proper; that said sections are constitutional both under the state and federal constitutions and that petitioner in no wise has demonstrated that he has been singled out for such invidious treatment by the state courts resulting in denial of due process of law as would warrant this court in issuing the writ prayed for.

It is, therefore, respectfully submitted that the petition for writ of certiorari in the instant matter should be denied.

Respectfully submitted,

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Dated, Sacramento, November 4, 1949

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Comes now, the respondent The People of the State of California and objects to the request of petitioner to dispense with the printing of the record on the Petition for Certiorari and on the hearing thereof in that petitioner herein has presented no grounds to the court to except himself from the provisions of Rule 38 of the Rules of the Supreme Court and that he should not be entitled to the granting of such motion without a showing that petitioner is insolvent and unable to bear the burden placed upon litigants in

this court who also are and have been in prison pending the application for a writ of certiorari to this court.

Dated: Sacramento, California
November 4, 1949

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APPENDIX

California Penal Code, Section 954

An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes of offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately. A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.

California Penal Code, Section 1098

When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the

court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section 1070 of this code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to the number of all the additional separate challenges allowed the defendants.

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